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BEFORE THE
OFFICE OF THE SECRETARY
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC 20549

In the Matter of:

Solicitations of Interest
Prior to a Registered Public Offering

File No. S7-01-19

REPLY COMMENTS OF LARA AMERI, J.D. CANDIDATE
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This comment is submitted in response to the Security and Exchange Commission's (the "Commission") proposed new Rule 163B to the Securities Act of 1933 (the "Securities Act"), and amendments to Rule 405. As a first year law student at Boston College Law School, I have developed an interest in securities regulation and am eager to share my thoughts on this rulemaking proposal. I support the Commission's proposal to expand the test-the-waters accommodation to all issuers and agree with the Commission's analysis of its several benefits. However, Rule 163B may be more successful for all actors in our capital markets if issuers are permitted to engage in test-the-waters communications with a greater pool of investors. I appreciate your consideration of my comments and recommendations regarding this notice of proposed rulemaking.

INTRODUCTION

Proposed Rule 163B echoes the Obama administration's Jumpstart Our Business Startups Act (the "JOBS Act"), which passed with substantial bipartisan support in 2012 and used unprecedented deregulation to facilitate public offerings and capital raising. The JOBS Act afforded several opportunities to emerging growth companies ("EGCs"), including allowing EGCs to test the waters with qualified institutional buyers ("QIBs") and institutional accredited investors ("IAIs") with less Commission oversight. This allowed EGCs to assess market demand and valuation and determine what elements of their business were important to investors while avoiding some of the Commission's expensive and burdensome "red tape" rules. Predictably, non-EGC issuers were quick to request test-the-waters communications and other accommodations for themselves.

The JOBS Act and the Commission's proposed Rule 163B reflect the current positive deregulation trend and give both issuers and investors more autonomy and flexibility in the market. However, Rule 163B can easily benefit more issuers and investors if the Commission were to democratize test-the-waters communications. Like the JOBS Act, the proposal limits permissible test-the-waters communications to QIBs and IAIs alone. This particular investor class is regarded as having an elite level of business sophistication, such that the typical, expansive regulations applied to other investors are rendered unnecessary. Other investor classes, often unfairly characterized as less sophisticated and even irrational, are insulated from the communications because of the generalization that they cannot sufficiently protect themselves in the market. However, these investors should not be precluded from market participation and investment opportunities under Rule 163B. If the investor category is expanded, issuers may be more successful in raising capital and gauging market interest and Main Street investors can act more autonomously in the market and reap the benefits of test-the-waters communications that are currently reserved for QIBs and IAIs. This comment proposes expanding the investor base in Rule 163B beyond sophisticated institutional investors to all accredited investors and, eventually, to all investor classes using efficient and cost-effective investor protections. Specifically, I offer the following comments:

1. Excluding investors from permissible test-the-waters communications is inconsistent with the Commission's policy goals to stimulate interest in the public market and prioritize Main Street investors.
2. All accredited investors should be included in Rule 163B communications because the investor protections already proposed in the Rule are effective safeguards for sophisticated investors.
3. All investors should be included in Rule 163B communications because there are efficient and cost-effective protections the Commission can add to the proposal to protect unsophisticated investors.

I. EXCLUDING INVESTORS FROM PERMISSIBLE TEST-THE-WATERS COMMUNICATIONS IS INCONSISTENT WITH THE COMMISSION'S POLICY GOALS TO STIMULATE INTEREST IN THE PUBLIC MARKET AND PRIORITIZE MAIN STREET INVESTORS.

Excluding investors from permissible test-the-waters communications is inconsistent with the Commission's policy goals to both reinvigorate our currently languid public market and prioritize our country's Main Street investors. The pubic market is notably stale, experiencing a significant decline in the last two decades, so facilitating public offerings has been a priority for Commission Chairman Jay Clayton.[1] Companies are choosing to raise capital in the private market in part because the private market's negligible regulatory oversight makes capital formation far easier than it is in the public market. However, the appeal of the private market creates a blowback on Main Street investors who are generally insulated from the private market

[1] *Wilmerhale 2018 IPO Report*: https://www.wilmerhale.com/en/insights/publications/2018-ipo-report

because they miss out on investment opportunities. Relatedly, the Commission's 2018-2022 *Strategic Plan* specifically prioritizes "the long-term interests of our Main Street investors."[2] Clayton said he wants to "identify ways to increase the number and range of long-term, cost-effective investment options available to retail investors."[3] This includes greater access to privately held companies.[4] Excluding investors from the test-the-waters communications in Rule 163B is inconsistent with these goals for several reasons. Comparatively, the benefits of expanding the pool of investors is multifold.

1. Expanding Rule 163B to include more investors may increase public offerings, which is consistent with the Commission's goal to reinvigorate the public market.

Expanding the pool of investors under Rule 163B to include more investors may increase public offerings. This is consistent with the Commission's goal to reinvigorate the public market after the market's long-term inactivity. Specifically, the number of publicly listed U.S. companies has fallen by about fifty percent in the last twenty years.[5]

The retail investment market is substantial in depth and scope. About 43 million U.S. households have a retirement or brokerage account.[6] One hundred million Americans in 56 million U.S. households (44% of all households) own at least one U.S. mutual fund.[7] Approximately 7,600 SEC-registered investment advisers serve retail investors, with over

[2] *SEC 2018-2022 Strategic Plan*: https://www.sec.gov/reports-and-publications/strategic-plan/reports-strategic-plan-2018-2022
[3] *Id*.
[4] *Chairman Jay Clayton – Remarks on Capital Formation at the Nashville 36/86 Entrepreneurship Festival*: https://www.sec.gov/news/speech/speech-clayton-082918
[5] *Wilmerhale 2018 IPO Report*: https://www.wilmerhale.com/en/insights/publications/2018-ipo-report
[6] Rel. No. 34-83063, *Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles* (Apr. 18, 2018): https://www.sec.gov/rules/proposed/2018/34-83063.pdf
[7] 2017 Investment Company Fact Book (ICI, 57th ed. 2017)

$12 trillion in retail client assets under management.[8] Approximately 34 million clients, and nearly 3,000 registered broker-dealers serve retail investors, with $3.6 trillion in balance sheet assets and 128 million customer accounts.[9] Now more than ever, retail investors want to invest and participate in the capital markets. After all, "the engine of economic grown in this country depends significantly on the willingness of Main Street investors to put their hard-earned capital at risk in our markets over the long term." Main Street investors should not have to sit idly by and wait for public offerings to spring up. Instead, they can help generate these offerings. As the Commission explains in the proposal, there is a direct correlation between an issuer's access to investors during the quiet period and the rate of public offerings.

The proposal explains at length that when issuers have tested the waters with investors, issuers are more likely to do a public offering because they can gauge market interest and ascertain valuations by speaking with investors. The Commission indicates that, by one estimate, 87% of all IPOs have been by EGCs since the enactment of the JOBS Act in 2012.[10] Indeed, like the JOBS Act, this proposal is intended to increase public offerings and stimulate our stale public market. Therefore, if issuers can test the waters with more investors, such as the many retail investors involved in our capital markets, they may be more inclined to pursue a public offering. Thus, it is pragmatic to broaden the investor pool under Rule 163B because it may stimulate the public market, facilitate capital formation, and yield greater access to returns on corporate growth and innovation.

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[8] Rel. No. 34-83063, *Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the use of Certain Names or Titles* (Apr. 18, 2018): https://www.sec.gov/rules/proposed/2018/34-83063.pdf

[9] *Id*.

[10] *Wilmerhale 2018 IPO Report*: https://www.wilmerhale.com/en/insights/publications/2018-ipo-report

2. Expanding Rule 163B communications to include Main Street investors may aid one of the Commission's policy goals to facilitate Main Street investor participation in the flourishing private market.

Allowing test-the-waters communications between private issuers and Main Street investors may give investors better access to lucrative private investments, which the Commission wants to encourage. Companies are increasingly choosing to stay private rather than pursue public offerings. Those companies that do make public offerings now wait about twice as long to go public and raise about twice as much money in the private capital market before they do.[11] As a result, the private capital market is flourishing, while the public market is failing. Main Street investors, who are generally shut out from investing in the private market, are missing out on investment opportunities.

Addressing this concern, Clayton said the Commission would be analyzing the private offering system this year to ascertain how best to give Main Street investors access to a larger pool of private companies.[12] Steps to achieve that goal were supposed to happen "pretty quickly," but the Commission has not made concrete regulatory changes to give investors this opportunity.[13] Allowing Main Street investors to engage in quiet period communications with private issuers increases their exposure to valuable private investments. There are certainly other steps the Commission can take to achieve this particular goal, but allowing private issuers to test the waters with a greater range of investors may at least help Main Street investors get their financial foot in the door.

[11] *Wilmerhale 2018 IPO Report*: https://www.wilmerhale.com/en/insights/publications/2018-ipo-report
[12] *Chairman Jay Clayton – Remarks on Capital Formation at the Nashville 36/86 Entrepreneurship Festival*: https://www.sec.gov/news/speech/speech-clayton-082918
[13] *Chairman Jay Clayton – Remarks on Capital Formation at the Nashville 36/86 Entrepreneurship Festival*: https://www.sec.gov/news/speech/speech-clayton-082918

3. As proposed, Rule 163B may do little to benefit Main Street investors because it is possible it will not promote public offerings.

The Commission explains at length in its proposal how Rule 163B will benefit participating issuers, QIBs, and IASs and will potentially make IPOs easier and more appealing, but Main Street investors are largely left out of the equation. These investors benefit from the proposal *only* if it encourages more issuers to go public. Whether Rule 163B will actually encourage more IPOs is questionable, with some specialists saying the Rule will have "limited benefits in promoting public offerings."[14] It is possible that Main Street investors will not benefit from the proposal at all.

4. As proposed, Rule 163B may harm Main Street investors because it decreases their market influence by bolstering QIB and IAI dominance.

As proposed, Rule 163B has the potential to harm Main Street investors. Currently, the market is overwhelmingly drive by large institutional players. Rule 163B gives monolith QIBs and IAIs more influence in the market and better investment opportunities, both of which Main Street investors currently lack. When the public market is dominated by select players, those players can exploit their market power and ultimately harm other participants. Giving special treatment to QIBs and IAIs, who already have their thumb on the financial markets, ostracizes smaller investors and decreases their market representation, which is contrary to the Commission's policy goals. Evening out the investor playing field by permitting test-the-waters communications with smaller investors may give them more investment opportunities and market representation and will allow them to have greater influence in the financial market.

[14] *Sidley Austin - Practical Implications of Proposed Testing the Waters for All Issuers under U.S. Securities Law*: https://www.sidley.com/en/insights/newsupdates/2019/03/practical-implications-of-proposed-testing-the-waters-for-all-issuers

II. ALL ACCREDITED INVESTORS SHOULD BE INCLUDED IN RULE 163B COMMUNICATIONS BECAUSE THE INVESTOR PROTECTIONS PROPOSED IN THE RULE ARE EFFECTIVE SAFEGUARDS FOR SOPHISTICATED INVESTORS.

All accredited investors should be included in Rule 163B communications because the investor protections proposed in the Rule are effective safeguards for sophisticated investors. The Commission singles out QIBs and IAIs from the accredited investor category based on the widely accepted notion that QIBs and IAIs have an elite level of sophistication that makes them uniquely adept at assessing investment opportunities. However, it is unnecessary to distinguish QIBs and IAIs from the entire accredited investor category in this instance because the safeguards already provided in Rule 163B are enough to protect accredited investors in general. Accredited investors already successfully navigate investment opportunities and are solicited by investors in a domain with little regulatory oversight when issuers opt to raise capital through private placements. In private placement transactions, accredited investors are trusted to evaluate the merits of an investment and fend for themselves because issuers are not required to provide a prospectus or any specific disclosures. Accordingly, the following safeguards proposed in Rule163B are enough to protect accredited investors because there is more oversight than in private solicitations.

The Commission proffers two important methods, among others, to ensure QIBs and IAIs interests are protected in their Rule 163B communications with issuers, both of which are already considered reliable protections for accredited investors in Rule 5(d) communications. First, the information contained in Rule 163B communications may not conflict with material information in the related Form S-1 if the issuer proceeds with a public offering. Accredited investors, who are generally regarded as having some degree of financial sophistication and business acumen, can review the wealth of information in the registration statement to ensure it is consistent with any 163B solicitations. Second, Rule 12 and anti-fraud liability apply to Rule 163B communications because they are considered "offers" under Section 2(a)(3) of the Securities Act. The threat of this liability will act as a strong deterrent for issuers who are tempted to provide misleading information.

Additionally, there is very low risk to investors where a public issuer tests the waters in contemplation of a follow-on offering. Accredited investors can easily review the issuer's past filings on EDGAR to evaluate potential investments and can compare publicly available data to any test-the-waters solicitations. Therefore, accredited investors are even less likely to be misled in follow-on offering solicitations than in pre-registration offering solicitations and should be included in Rule 163B.

III. ALL INVESTORS SHOULD BE INCLUDED IN RULE 163B COMMUNICATIONS BECAUSE THERE ARE EFFICIENT AND COST-EFFECTIVE PROTECTIONS THE COMMISSION CAN ADD TO THE PROPOSAL TO PROTECT UNSOPHISTICATED INVESTORS.

All investors should be included in Rule 163B communications because there are efficient and cost-effective safeguards the Commission can add to the Rule to protect unsophisticated investors. As the Commission notes in its proposal, there are greater risks associated with allowing unaccredited investors to engage in test-the-waters communications. Many of these investors are rational, consistent, and evaluative agents, but it is inevitably possible for some to make poor decisions by not vetting the investment or being driven by emotions or market "hype." However, well-known seasoned issuers ("WKSIs") and eligible issuers under Regulation A can already test the waters with unaccredited investors, subject to legend and filing requirements to protect the investors. It would be inconsistent for the Commission to allow broad solicitation in these instances, yet quarantine a majority of the investor base with Rule 163B. The Commission should apply the cost-effective investor protections already used in test-the-waters communications governed by Rule 163, Rule 255, and Rule 5(d) to Rule 163B in order to include unaccredited investors.

Rule 163 and Rule 255 require issuers to include legends in their communications with investors. Although legends may be a mere formality to QIBs and IAIs, they are a cost-effective and efficient tool to provide notice to less sophisticated investors. Legends do not burden issuers with expensive or stringent regulations and instead suggest they solicit investors cautiously and responsibly, which they should be doing anyway. The Commission could safely extend 163B communications to more investors simply by adding legend requirements.

Additionally, Rule 163 and Rule 255 require communications to be filed with the Commission as an extra layer of investor protection. However, this is inconvenient for issuers because filing risks revealing proprietary information to competitors and can be costly and burdensome. Unlike Rule 163 and Rule 255, Rule 5(d) does not require EGCs to file their communications, but the Commission reserves the right to request that issuers produce them. The Commission can use this "file upon request" method in Rule 163B regulations to protect investors without over burdening issuers. For example, when Rule 5(d) became effective, the Commission requested to see dozens of communications between EGCs and potential investors, presumably to ensure the communications were not being used inappropriately. Here, the Commission can use the same process to oversee how the communications are being used by requesting that issuers produce communications at the outset. This provides protection to investors, but will not place a long term burden on issuers.

CONCLUSION

The Commission does not have to "helicopter parent" investors in order to effectively protect them, nor does it have to bog down issuers with red tape regulations. Rule 163B will give issuers more access to capital formation, autonomy in their business decisions, and will ultimately help them avoid inefficient spending in their attempts to comply with outdated securities rules. Deregulating proposed Rule 163B to broaden the investor pool can safely offer Main Street investors a more diverse array of investment opportunities that are currently reserved for sophisticated institutional investors, will increase Main Street investor representation, and ultimately may be a catalyst for a more robust market.

Respectfully submitted,

__/s/_S. Lara Ameri_

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